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The New York City Employees' Retirement System*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re APPLE COMPUTER INC. DERIVATIVE
LITIGATION

This Document Relates To:

MARTIN VOGEL and KENNETH
MAHONEY, on Behalf of Themselves and
All Other Similarly Situated,

Plaintiffs,

v.

STEVEN JOBS, PETER OPPENHEIMER,
FRED ANDERSON, WILLIAM V.
CAMPBELL, MILLARD S. DREXLER,
ALBERT GORE, Jr., ARTHUR D. LEVINSON,
JEROME B. YORK and APPLE COMPUTER,
INC.,

Defendants.

Master File No. C-06-04128-JF

RESPONSE OF THE NEW YORK CITY
EMPLOYEES' RETIREMENT SYSTEM
TO THE MOTION FOR APPOINTMENT
OF FINKELSTEIN & KRINSK LLP TO
THE MANAGEMENT COMMITTEE
AND APPOINTMENT OF SARATOGA
PLAINTIFFS AS LEAD PLAINTIFF

Date: January 19, 2007
Time: 9:00 a.m.
Courtroom 3, 5th Floor
Honorable Jeremy Fogel

Case No.: C-06-05208-JF

Honorable Jeremy Fogel

1 The New York City Employee's Retirement System ("NYCERS") submits this
2 response to the Motion For Appointment Of Finkelstein & Krinsk LLP To The Management
3 Committee And Appointment Of Saratoga Plaintiffs As Lead Plaintiff (the "Saratoga
4 Plaintiffs' Motion"), filed in *In re Apple Computers Inc. Derivative Litigation*, Master File No.
5 C-06-04128-JF (the "Derivative Litigation"). NYCERS takes no position with respect to the
6 Saratoga Plaintiffs' Motion, beyond to note that, although the motion was filed as relating to
7 "All Actions," neither the Saratoga Plaintiffs nor the court-designated Lead Plaintiffs in the
8 Derivative Litigation, purport to seek representation in or control over the claims asserted in
9 *Vogel, et al. v. Jobs, et al.*, File No. C-06-05208 (the "*Vogel* Litigation"), which was deemed
10 "related" to the Derivative Litigation by Order dated November 21, 2006 (filed November 27,
11 2006).

12 On October 24, 2006, in accordance with Section 21D(a)(3)(B) of the Securities
13 Exchange Act of 1934, 15 U.S.C. § 78u-4(a)(3)(B), as amended by Section 101(a) of the
14 Private Securities Litigation Reform Act of 1995 (the "PSLRA"), NYCERS applied to serve as
15 the Lead Plaintiff in the *Vogel* Litigation. NYCERS was the only shareholder who moved for
16 appointment as lead plaintiff in the *Vogel* Litigation in accordance with the PSLRA's statutory
17 requirements. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). On November 13, 2006, Defendants in
18 the *Vogel* Litigation, filed a response to NYCERS's motion that represented that "Defendants
19 take no position on who should be appointed lead plaintiff or lead counsel in this [*Vogel*]
20 action." Defendants' Response to Motion for Appointment of Lead Plaintiff, at 2, Case 5:06-
21 CV-05208-JF, Document 12, filed 11/13/06. NYCERS's outstanding motion, therefore, is
22 unopposed.¹

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26 ¹ NYCERS's motion originally was noticed for December 4, 2006, before the Honorable Marilyn H.
27 Patel. By Order dated November 21, 2006, however, this Court found that the *Vogel* Litigation was
28 related to the Derivative Litigation, vacated the notice of the hearing on NYCERS's outstanding
motion for appointment as Lead Plaintiff. NYCERS has now renoticed the hearing on its
outstanding and unopposed motion for appointment as Lead Plaintiff for February 23, 2007.

On December 18, 2006, the court-designated Lead Plaintiffs in the Derivative Litigation filed the Consolidated Shareholder Derivative Complaint (the “Derivative Complaint”). The Derivative Complaint does not assert any claims under the federal securities laws on behalf of a class of investors who purchased securities issued by Apple Computers, Inc. (“Apple”), which claims are at issue in the *Vogel* Litigation. The Saratoga Plaintiffs’ Motion does not seek appointment as lead plaintiff or lead counsel in the *Vogel* Litigation, and indeed does not comply with the PSLRA’s statutory requirements for purposes of seeking appointment as lead plaintiff in that case in any event.

Dated: January 10, 2007

Respectfully submitted,

GRANT & EISENHOFER P.A.

/s/ Mary S. Thomas

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